MSS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 4685 OF 1996

HARSHAD MORARJI KHANT .. PLAINTIFF

Vs.

KAMAL VITHALDAS PANCHAL & ORS... DEFENDANTS

Mr. Prakash G. Lad for plaintiff

None for the defendants

CORAM: SMT. RANJANA DESAI, J.

DATED: SEPTEMBER 07, 2007.

P.C.

. This suit is placed before me under the caption "Undefended Suits for Exparte Decree". The plaintiff has filed his affidavit in lieu of Examination-in-Chief. It is on record at Exh. - "X". The plaintiff has also filed compilation of documents which is at Exh.-"A-Colly.".

2. The plaintiff is present in the court. He has confirmed the contents of the plaint and the affidavit of examination-in-chief and the documents.

3. The plaintiff's case as disclosed from the plaint and affidavit of examination-in-chief is that the plaintiff is a broker carrying on business as broker in plastic market and residing at the address mentioned in the cause title. Defendant 2 is the mother of defendant 1. Defendant 3 is the brother of defendant 1. They are residing at the address mentioned in the cause title. According to the plaintiff, defendant 1 is carrying on business as a tours and travel agent. Plaintiff and defendant 1 had cordial relations. Defendant 1 approached the plaintiff and informed him that he was desirous of starting a business of Restaurant & Bar and requested him for financial help by way of friendly loan. Considering the cordial relationship the plaintiff agreed to advance friendly loan to defendant 1.

4. It is the case of the plaintiff that defendant 1 informed him that he is the constituted attorney of defendants 2 and 3 and defendants 2 and 3 have authorized him to mortgage the flat standing in their name and to raise the loan. On the said representation of defendant 1, the plaintiff advanced the loan to defendant 1 against execution of Demand Promissory Notes, Receipts and documents.

It is the case of the plaintiff that he is conversant with the signature of defendant 1.

5. It is the plaintiff’s case that on 7/1/95, he had given Rs.11,000/- to defendant 1 in cash as loan. According to the plaintiff, defendant 1 has executed Demand Promissory note dated 7/1/95 and promised to pay the said amount along with interest @ 2% per month. The Demand Promissory Note in original is tendered in the Court and is marked as Exhibit "1". It is signed by defendant 1 in plaintiff’s presence as constituted attorney of defendants 2 and 3. The plaintiff has identified signature of defendant 1.

6. The plaintiff’s case is that on 8/1/95, he advanced Rs.20,000/- to the 1st defendant in cash. Defendant 1 executed Demand Promissory Note dated 8/1/95 and promised to pay the said amount along with interest @ 2% per month. The said Demand Promissory Note is signed by defendant 1 in his presence being Constituted Attorney of defendants 2 and 3. The plaintiff has identified the signature of defendant 1. Original Demand Promissory Note is on record and it is marked as Exhibit "2". The plaintiff has identified signature of defendant 1.

7. According to the plaintiff on 9/1/95, he gave an amount of Rs.20,000/- to the 1st defendant in cash. The 1st defendant promised to pay the said amount along with interest @ 2% per month. He executed Demand Promissory Note dated 9/1/95. He signed it in the presence of the plaintiff being the constituted attorney of defendants 2 and 3. original Demand Promissory Note is on record and it is marked as Exhibit "3". The plaintiff has identified the signature of defendant 1.

8. The plaintiff’s case is that on 10/1/95 he has given a sum of Rs.10,000/- to the 1st defendant in cash. Defendant 1 has executed Demand Promissory Note on 10/1/95 and promised to pay the said amount along with interest @ 2% per month. Original Demand Promissory Note is at Exhibit "4". The plaintiff has identified the signature of defendant 1.

9. According to the plaintiff on 12/1/95 he advanced an amount of Rs.15,000/- to defendant 1 in cash. Defendant 1 accepted the Demand Promissory Note of the same date promising to pay the said amount along with interest @ 2% per month in lieu

of the said amount. Defendant 1 has signed this Demand Promissory Note as constituted attorney of defendants 2 and 3. The plaintiff has identified the signature of defendant 1. Original Demand Promissory Note is on record and is marked as Exhibit "5". The plaintiff has identified signature of defendant 1.

10. According to the plaintiff on 13/1/95, the plaintiff had paid another sum of Rs.10,000/- to defendant 1 in cash. Defendant 1 had executed Demand Promissory Note dated 13/1/95 and promised to pay the said amount of Rs.10,000/- along with interest @ 2% per month in lieu of the amount received in cash. According to the plaintiff Demand Promissory Note is signed by defendant 1 as constituted attorney of defendant Nos. 2 and 3. He has identified the signature of defendant 1. The said Demand Promissory Note is on record and is marked as Exhibit "6".

11. According to the plaintiff on 13/1/95 he had given Rs.15,000/- in cash to defendant 1. Defendant 1 had executed Demand Promissory Note dated 13/1/95 and promised to pay the said amount of Rs.15,000/- along with interest at 2% per month.

The said promissory note is signed by defendant 1 in the plaintiff's presence, being the constituted attorney of defenadnts 2 and 3. The plaintiff has identified the signature of defendant 1. The said promissory note is on record. It is marked Exhibit "7".

12. According to the plaintiff on 14/1/95 he had given Rs.10,000/- to defendant 1. Defendant 1 had executed Demand Promissory Note dated 14/1/95 and promised to pay him Rs.10,000/- along with interest @ 2% per month. According to the plaintiff he had handed over the said sum to defendant 1 in cash. Defendant 1 had executed the Demand Promissory Note dated 14/1/95 for the repayment of the said amount. Defendant 1 has signed as constituted attorney of defendants 2 and 3. The plaintiff has identified the signature of defendant 1. Original Demand Promissory Note is on record and it is at Exhibit "8".

13. According to the plaintiff on 14/1/95 he had given Rs.15,000/- to defendant 1. Defendant 1 had executed Demand Promissory Note dated 14/1/95 and promised to pay the said amount with interest @ 2% per month. The plaintiff had handed over the said

sum of Rs.15,000/- to defendant 1 in cash. Defendant 1 has accepted it as loan amount. A Demand Promissory Note is signed by defendant 1 in his presence as constituted attorney of defendants 2 and 3. The plaintiff has identified the signature of defendant 1. Original Demand Promissory Note is on record and marked as Exhibit "9".

14. According to the plaintiff on 15/1/95 the plaintiff had given Rs.15,000/- to defendant 1 as loan. Defendant 1 had executed Demand Promissory Note dated 15/1/95 and promised to pay him the said amount with interest @ 2% per month. Plaintiff had handed over the said sum to defendant 1 in cash. The said Demand Promissory Note is signed in the presence of the plaintiff as constituted attorney of defendants 2 and 3. Original Demand Promissory Note is on record and marked as Exhibit "10". The plaintiff has identified the signature of defendant 1.

15. According to the plaintiff on 16/1/95 he had given Rs.15,000/- to defendant 1. Defendant 1 had executed a Demand Promissory Note dated 16/1/95 and promised to pay the said amount to him along with

interest @ 2% per month. He had handed over the said amount of Rs.15,000/- to defendant 1 in cash. Defendant 1 had signed the said Demand Promissory Note as constituted attorney of defendants 2 and 3. The said Demand Promissory Note is on record and is marked as Exhibit-"11". The plaintiff has identified the signature of defendant 1.

16. According to the plaintiff on 17/1/95 he had paid Rs.15,000/- to defendant 1 as loan. Defendant 1 had executed Demand Promissory Note dated 17/1/95 and promised to pay the said amount along with interest @ 2% per month. He had handed over the said amount in cash to defendant 1. Defendant 1 had signed the Demand Promissory Note as constituted attorney of defendants 2 and 3. The plaintiff has identified the signature of defendant 1. The said Demand Promissory Note is on record and it is marked as Exhibit "12".

17. According to the plaintiff on 17/1/95, he had given Rs.15,000/- to defendant 1 as loan. Defendant 2 had executed Demand Promissory Note dated 17/1/95 and promised to pay him the said amount along with interest @ 2% per month. He had handed over the said sum in cash to defendant 1.

Defendant 1 had signed on the said Demand Promissory Note being the constituted attorney of defendants 2 and 3. The plaintiff has identified the signature of defendant 1. Original Demand Promissory Note is on record and is marked as Exhibit "13".

18. According to the plaintiff, on 18/1/95 he had given Rs.15,000/- to defendant 1 as loan. Defendant 1 had executed Demand Promissory Note dated 18/1/95 and promised to pay the said amount along with interest @ 2% per month. The said amount was handed over by the plaintiff to defendant 1 in cash. According to the plaintiff, defendant 1 has signed on the said promissory note as constituted attorney of defendants 2 and 3. The plaintiff has identified the signature of defendant 1. Original Demand Promissory Note is on record and marked as Exhibit "14".

19. It is the case of the plaintiff that the defendants further requested for an amount of Rs.1,50,000/- for business purposes . He, therefore, insisted that defendants 2 and 3 should also personally execute the documents in his favour. He, therefore, advanced a sum of

Rs.50,000/- in cash on 17/1/95 towards the further loan advanced by him to defendant 2 and 3 in cash. Defendants 2 and 3 then issued receipt dated 17/1/95 for the said amount and promised to repay the said amount within three months. Defendants 2 and 3 have signed the said receipt dated 17/1/95 in the presence of the plaintiff. The plaintiff has identified the signatures of defendants 2 and 3. The plaintiff has produced the receipt dated 17/1/95 for the sum of Rs.50,000/- on record and it is marked as Exhibit "15".

20. It is the case of the plaintiff that the plaintiff again advanced a sum of Rs.1,00,000/- in cash towards further loan advanced by him to defendants 2 and 3 in cash on 17/1/95. Defendants 2 and 3 issued receipt dated 17/1/95 for the said amount and promised to repay the said amount within three months. Defendants 2 and 3 have signed the receipt dated 17/1/95 in his presence. The plaintiff has identified signatures of defendants 2 and 3. The plaintiff has produced the said receipt dated 17/1/95 for the sum of Rs.1,00,000/-It is on record. It is marked as Exhibit "16".

21. Thus it is the case of the plaintiffs that he

has advanced Rs.3,51,000/- to the defendants. Defendants have agreed to repay the said amount within a period of three months. The defendants have given him the title certificate i.e. Sale Agreement of flat No. 510 of building Saidham, Om Saidham Co-operative Housing Society, Sector 17, New Bombay and the Share Certificate of the said flat towards the security for the repayment of the said loan amount of Rs.3,51,000/- with interest @ 2% per month. The defendants have avoided to make repayment of the said amounts. According to the plaintiff, the defendants have handed over to him the Agreement of Sale dated 4/6/86 of the said flat and share certificate thereof in lieu of repayment of loan. The plaintiff has produced the said agreement of sale dated 4/6/86 between defendants 2 and 3 and M/s. Saibaba Enterprises Builders. He has identified signatures of defendants 2 and 3. The said agreement is on record and marked as Exhibit "17".

22. According to the plaintiff, the defendants have also handed over to him share certificate bearing Serial No. 50, Members Registration No. 50 of Flat No. 510. The said share certificate is standing in the name of defendants 2 and 3, having

their five shares from Serial No. 246 to 250 of Rs.50/- each. The said share certificate dated 1/6/90 is on record and marked as Exhibit "18".

23. It is the case of the plaintiff that defendants avoided to make payment. Hence through his advocate’s letter dated 10/6/96 written to defendant 1, defendant 1 was requested to make repayment of the said amount of Rs.2,01,000/- together with interest at 24% per annum. The signature of the advocate Shri Vora is identified by the plaintiff. The said letter along with postal A.D. card is marked as "Exhibit "19-Colly.".

24. It is the case of the plaintiff that because the defendants 2 and 3 avoided to make payment of the said amounts, he through his advocate’s letter dated 10/6/96 addressed to defendants 2 and 3 requested them to repay the said loan. The plaintiff has identified the signature of his advocate Shri Vora on one of the said letters. The said letter dated 10/6/96 along with postal A.D. Card is marked as Exhibit "20-Colly".

25. According to the plaintiff, defendants 2 and 3

through their advocate's letter dated 29/6/96 replied to the said letter dated 10/6/96 and admitted the receipt of further loan amount of Rs.1,50,000/- and stated that the said amount was advanced against the mortgage of Flat No. 510 situated in Saidham, Om Saidham Co-operative Housing Society Ltd., Sector 17, New Mumbai. According to the plaintiff by the said letter defendants 2 and 3 have shown their readiness and willingness to repay the said amount on return of the original title deeds. The said letter dated 29/6/96 is on record and marked Exhibit "21".

26. According to the plaintiff, through advocate's letter dated 18/7/96 the plaintiff replied the letter of the advocate of defendants 2 and 3. It was stated in the letter that a total amount of Rs.3,51,000/- was advanced against mortgage of flat No. 510. According to the plaintiff copy of the said letter dated 18/7/96 along with the postal acknowledgement card is on record. The plaintiff has identified the signature of the advocate Shri Vora. Copy of the said letter along with postal acknowledgement card is marked as Exhibit "22 Colly.".

27. According to the plaintiff despite several

demands and requests the defendants avoided to pay the loan amount. The plaintiff through his advocate's letter dated 17/9/96 again called upon the defendants to repay the amount of Rs.3,51,000/- with interest @ 2% per month. The said letter is on record. The plaintiff has identified the signature of his advocate Shri Shah. Copy of the said letter and postal acknowledgement card of defendants 2 and 3 and slip of the under certificate of posting are on record. They are marked as Exhibit "23-Colly".

28. According to the plaintiff, the repayment of the said loan amount of Rs.3,51,000/- advanced to the defendants with interest is secured by issuing Promissory Notes, receipts and by valid mortgage of Flat No. 510 situated in Saidham Co-operative Housing Society, New Mumbai in the plaintiff's favour and by handing over of the title deeds of the said flat. The defendants have not repaid the said amount and avoided to repay the said loan amount and the plaintiff is entitled to enforce and realise the mortgage security to recover the aforesaid loan amount of Rs.3,51,000/-. The plaintiff has, therefore, filed this suit to recover the amount of Rs.5,05,540/- being the

interest from 17/1/95 till 18/11/96 on Rs.3,51,00/- @ 24% per annum and for further interest @ 24% per annum from the date of filing of the suit till full realization.

29. According to the plaintiff on failure of the defendants to make payment, he is entitled to realization of the mortgage security being Flat No. 510, Saidham Co-operative Housing Society, Sector 17, Vashi, New Mumbai in his favour.

30. The defendants have been served, however, they have not contested the suit. No written statement is filed. In the circumstances of the case and having regards to the averments made in the plaint and affidavit in lieu of Examination-in-Chief and having regard to the documents produced by the plaintiff, in my opinion the plaintiff is entitled to a decree in terms of prayer clause (a) with a modification as regards rate of interest from the date of decree till realisation. Hence suit is decreed in terms of prayer clause (a) with a modification that from the date of decree till realisation, the plaintiffs shall be entitled to interest @ 6% per annum and not at 24% per annum as prayed. There shall also be a decree in terms of

prayer clause (b) i.e. the defendants are jointly and severally ordered and decreed to pay to the plaintiffs a sum of Rs.5,05,540/- with interest as per particulars of claim Exhibit-I with interest @ 6% per annum from the date of decree till realisation, by 16th March, 2008.

31. In the event of the defendants failing to pay the decretal amount by 16th March, 2008, the flat bearing No. 510, Sai Dham, Sector 17, Vashi, New Bombay 400 703, which is the security for the mortgage be sold by public auction or private treaty and the net sale proceeds be paid over to the plaintiff towards satisfaction of his claim. There shall be a decree in terms of prayer clause (c) of the plaint.

32. Suit is disposed of.

JUDGE.